

ORIGINAL

RECEIVED

AUG 19 1994

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Implementation of Sections 3(n) )  
and 332 of the Communications Act )  
 )  
Regulatory Treatment of Mobile Services )

GN Docket No. 93-252

DOCKET FILE COPY ORIGINAL

To: The Commission

**REPLY COMMENTS OF  
ROMGAT COMMUNICATION, L.P.**

Ronald E. Blaylock  
President  
ROMGAT Communication, L.P.  
245 Park Avenue, 17th Floor  
New York, NY 10167

Dated: August 19, 1994

No. of Copies rec'd 0+10  
List ABCDE

RECEIVED

AUG 1 0 17

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
Implementation of Sections 3(n) )  
and 332 of the Communications Act )  
 )  
Regulatory Treatment of Mobile Services )

GN Docket No. 93-252

DOCKET FILE COPY ORIGINAL

**REPLY COMMENTS OF ROMGAT COMMUNICATION, L.P.**

**STATEMENT OF INTEREST**

ROMGAT Communication, L.P. ("ROMGAT") is a small business owned and controlled by women and minorities that plans to participate in the provision of 2 GHz Personal Communications Services ("broadband PCS"). Because several members of ROMGAT's "control group" of women and minorities lack sufficient direct experience in the day-to-day management of a communications service provider, ROMGAT plans, if it succeeds in acquiring a broadband PCS license, to enter into a management and/or joint marketing agreement with a third party or a passive investor.<sup>1</sup> ROMGAT submits that the Commission's proposal in the Second Further Notice of Proposed Rule Making in GN Docket No. 93-252

---

<sup>1</sup> Any such agreement(s) will fully comply with Section 310(d) of the Communications Act of 1934 ("Communications Act"), 47 U.S.C. § 310(d), as that provision has been interpreted by the courts. See Intermountain Microwave, 2 Rad. Reg. (P & F) 983, 984 (1963) ("Intermountain").

("Second Further Notice") to deem all management agreements, resale agreements and joint marketing agreements ("non-equity relationships") attributable for purposes of the cellular/PCS cross-ownership rule, the 40 MHz PCS spectrum aggregation cap and the general 45 MHz Commercial Mobile Radio Services ("CMRS") spectrum aggregation cap would severely restrict ROMGAT's ability to hire management specialists with sufficient telecommunications experience and to obtain adequate financing for both the broadband PCS auction and the subsequent build-out of the PCS system. Accordingly, ROMGAT has a direct interest in the outcome of this proceeding.

#### **REPLY COMMENTS**

I. The Overwhelming Majority of Commenters Oppose Attributing Non-Equity Interests for Purposes of Commission's Spectrum Aggregation Caps

In the Second Further Notice, the Commission proposed to deem all non-equity relationships attributable for purposes of the 40 MHz PCS spectrum aggregation cap, the general 45 MHz CMRS spectrum aggregation cap and the cellular/PCS cross-ownership rule (collectively, the "Spectrum Caps").<sup>2</sup> Second Further Notice suggests that even non-equity relationships that meet the Intermountain control test should be attributable because they could raise "anti-

---

<sup>2</sup> The Commission stated that all non-equity relationships that constitute an unauthorized transfer of control under Intermountain are necessarily attributable. Therefore, it limited its proposal to those non-equity relationships that do not constitute unauthorized transfers of control under Intermountain.

competitive" concerns where the manager, reseller or marketer acquires special proprietary information about a licensee's customer base and pricing information which, if used in an anti-competitive manner, could lead to a reduction in choices for the consumer of communications services.

None of the eighteen commenters supported the Commission's proposal to attribute all non-equity relationships for purposes of the Spectrum Caps.<sup>3</sup> In addition, only one commenter, Columbia PCS, supported the Commission's proposal to consider management agreements attributable. ROMGAT joins the chorus of opposition to the Commission's proposals, but specifically opposes the comments of Columbia PCS as they concern the attributability of management contracts.

As all the commenters point out, if a non-equity agreement which meets the Intermountain control test raises anti-competitive concerns, then such anti-competitive effects can be reached by federal antitrust laws and regulations, as enforced by the Department of Justice and Federal Trade Commission, and state laws governing the fiduciary obligations of persons in control of corporations and

---

<sup>3</sup> See Comments of: Motorola, Inc., Columbia PCS, Inc., Pluscom, CTIA, Cellular Service, Inc., PCC Management Corp., LCC, L.L.C., Simrom, Inc., National Cellular Resellers, Inc., GTE, Rural Cellular Association, Pacific Bell Mobile Services, Southwestern Bell Telephone Company, Vanguard Cellular Systems, Inc., Nextel Communications, Inc., American Mobile Satellite Corporation, NYNEX Corporation, and McCaw Cellular Communications, Inc.

partnerships.<sup>4</sup> Further, the Commission also has the necessary authority to investigate anti-competitive behavior by licensees as part of its public interest obligations under the Communications Act.<sup>5</sup> Therefore, ROMGAT submits that because the Commission has existing authority and that there are existing laws designed to reach any anti-competitive behavior associated with non-equity relationships, the Commission should decline to adopt the proposed rules.<sup>6</sup>

ROMGAT submits that the one commenter to support the attributability of management contracts, Columbia PCS, appears to do so to deter against "the obvious specter of shams" rather than the for competition-related reasons.<sup>7</sup> The Second Further Notice did not suggest that its attribution rule was designed to further safeguard against "sham" designated entities<sup>8</sup> from acquiring

---

<sup>4</sup> But see, Comments of Columbia PCS (stating that federal antitrust laws and regulations are adequate to address any anticompetitive concerns raised by joint marketing agreements, but not necessarily adequate in the context of management agreements).

<sup>5</sup> See 47 U.S.C. §§ 303, 308 and 309.

<sup>6</sup> ROMGAT notes that the Communications Act, as amended by the Omnibus Budget Reconciliation Act of 1993, does not require the FCC to adopt the proposed rules.

<sup>7</sup> Comments of Columbia PCS at 1. Columbia PCS only makes a cursory mention of how attribution of management contracts could deter anti-competitive behavior.

<sup>8</sup> "Designated entities" are women-and minority-owned businesses, small businesses, and rural telephone companies.

auction preferences. In fact, the Second Further Notice does not arise from the auction proceeding, but rather from the "regulatory parity" proceeding. In the auction proceeding, the Commission adopted strict designated entity eligibility rules, definitions and safeguards that are narrowly tailored to ensure that only bona fide designated entities are eligible for auction preferences. Accordingly, ROMGAT submits that Columbia PCS has cited a basis for the attribution rule that is wholly unrelated to the Commission's stated purpose for the proposed rule, and that if Columbia PCS seeks reconsideration of the designated entity eligibility rules, the proper forum is the auction proceeding.<sup>9</sup> See, e.g., Comments of CTIA at 3-4 (noting that the Commission's designated entity eligibility requirements and safeguards are adequate to deter "shams").<sup>10</sup>

B. The Commenters Agree that the Proposal Would Harm Woman- and Minority-Owned Businesses Disproportionately

If the attribution rule would apply to management agreements that otherwise meet Intermountain, it would severely restrict the ability of woman- and minority-owned businesses to hire the level of expertise they require to assist in the day-to-day management of their systems. As Southwestern Bell Telephone Compa-

---

<sup>9</sup> ROMGAT does not agree with all aspects of the Commission's designated entity eligibility rules for broadband PCS recently adopted in the auction proceeding, but will raise such concerns in PP Docket No. 93-253.

<sup>10</sup> Columbia PCS also requests that the Commission clarify its control test. ROMGAT submits, however, that this matter is being decided in a separate forum: DA No. 94-376; File No. 1421-CL-P-134A-86.

ny ("SBTC") and other commenters note,<sup>11</sup> bona fide management agreements help licensees to employ qualified managers. Minority ownership in the broadcast industry is currently estimated at less than three percent, and even lower in the telecommunications sector.<sup>12</sup> Women-owned businesses, as the Commission found in the competitive bidding proceeding, also comprise a small minority of telecommunications industry. As a result, the need for management contracts and other non-equity relationships is greatest among potential licensees that are owned and controlled by women and minorities because most lack direct experience as communications service providers. Therefore, to the extent the attribution rule evaporates the pool of qualified managers, it will disproportionately harm qualified woman- and minority-owned businesses. See, e.g., Comments of Motorola at 7-8.

In addition, management agreements will help woman- and minority-owned businesses gain access to capital by providing assurance to lenders and investors that the communications system is operated by experienced hands. See, e.g., Comments of Pluscom at 2-3. As the Commission is aware, Congress adopted Section 309(j)(4)(D) of the Communications Act in 1993 -- requiring the Commission to ensure the economic opportunity of the designated entities under a system of competitive bidding -- to address the lack of access to capital faced by designated

---

<sup>11</sup> See Comments of SBTC at 7.

<sup>12</sup> See Slow Gains by Minority Broadcasters, THE NEW YORK TIMES, Section D, Page 1 (May 31, 1994).

entities. The proposed attribution rule, however, would add uncertainty, complexity and possibly the cloud of litigation<sup>13</sup> to non-equity relationships, and therefore make it especially difficult for businesses owned and controlled by women and minorities to secure financing. Accordingly, if adopted, the proposed rule will harm woman- and minority-owned businesses disproportionately.

### C. Alternative Proposal

ROMGAT proposes that if the Commission acts against the record evidence and adopts the proposed attribution rule, it should apply to designated entities in a unique fashion because of the Commission's mandate to ensure their economic opportunity under a system of competitive bidding. Specifically, under the ROMGAT proposal, only 20% of the spectrum of the licensed to a qualified woman and/or minority-owned business should be attributable for purposes of the Spectrum Caps. Although adoption of even this alternative proposal would still unnecessarily increase the complexity and delay the pre- and post-auction qualification process, it would at least help alleviate the disproportionately adverse impact of the proposed rule on businesses owned and controlled by women and minorities.

---

<sup>13</sup> See, e.g., Comments of PacBell at 6 and Comments of PCC Management Group at 7-8.



## CONCLUSION

For the aforementioned reasons, ROMGAT recommends that the Commission not consider non-equity relationships attributable for purposes of the Spectrum Caps. Alternatively, if the Commission insists on attributing non-equity relationships, only 20% of the spectrum licensed to businesses owned and controlled by women and minorities should be attributable to the non-equity partner(s).

Respectfully submitted by:

**ROMGAT COMMUNICATION, L.P.**

By: Ronald E. Blaylock / M. J. M.  
Ronald E. Blaylock  
President